No. 13,673

IN THE

United States Court of Appeals

For the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO), and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 8,
Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,
Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,
Appellant,

vs.

MARTIN E. ADEN, et al.,
Appellees.

Appeals from the United States District Court for the District of Oregon.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

In this reply brief we shall not reiterate in any detail the argument for appellants. We shall endeavor only to restate it as simply as possible, with a view to correcting misconceptions found in the brief for appellee.

I.

THE PEREMPTORY AGENCY INSTRUCTION REQUIRES A REVERSAL OF THE JUDGMENT.

In its simplest terms our argument is this: Appellant unions, being associations, cannot act directly as can individuals. Liability can be imposed upon them or either of them only *vicariously.* In order for vicarious liability to be imposed, there must co-exist at least two factors: (a) conduct by *an agent or agents* which (b) is within the course and scope of agency. In the absence of either of these two elements, there can be no vicarious liability. The first element is primary, for absent *the fact of agency,* there is neither the occasion nor the possibility of inquiring into the question of course and scope of the agency. Both questions were sharply contested in the Court below. *The first as well as the second* was posed by the pleadings, and the pretrial order specifically formulated as one of the issues in the case:

> "(12) Was either Local 8 or any of the individual defendants named the authorized representative *or agent* of the International." (TR 67.)

The failure to submit *this* issue to the jury constitutes reversible error.

The fact, which appellee dwells upon at great length (Brief of Appellee [hereinafter cited Br.], pp. 15-16, 21-26), that the trial Court submitted the second question—i.e., the "course and scope" question—to the jury, is no answer to our argument that the first question, too, should have gone to the jury and that the failure to submit it deprived appellants

of "*their unquestioned right* to have a jury trial on all contested issues of fact", as appellee so aptly puts it. (Br. p. 22.)

That the existence of an agency relationship is a question of fact particularly appropriate for jury determination in civil[1] as well as criminal cases has been determined by the authorities already cited (Appellant's Opening Brief [hereinafter cited AOB], p. 24), none of which appellee has ever considered.[2]

While appellee's argument that Meehan, Gettings, Bodine and Schmidt were "undisputably" agents of the union (Br. pp. 16-21) might (or might not) have been a persuasive jury argument, it has no place here. The question here is, did the trial Court commit error in depriving appellants "of their unquestioned right" to a jury trial on the "contested issue of fact" which this clearly was.

In *Gunning v. Cooley,* 281 U.S. 90, at 94 (1930), the Supreme Court said:

> "Issues that depend upon the credibility of witnesses, and the effect or weight of evidence, are to be decided by the jury. And in determining the motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor

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[1]Appellee's attempted distinction of *United Brotherhood, etc. v. United States,* 330 U.S. 395 (Br. p. 21), is therefore irrelevant, even if valid.

[2]Other (but older) cases holding the same way are: *Quinlan v. Holbrook,* 162 F. 272 (1908); *Sloat-Darragh v. General Coal Co.,* 276 F. 502 (1921); *Denton v. Brocksmith,* 299 F. 559 (1924).

> of the latter all the inferences that fairly are deducible from them * * * Where uncertainty * * * arises from a conflict in the testimony or cause, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

This case was relied upon in this circuit in *Pacific Can Co. v. Hewes,* 95 F. 2d 42 (1938), this Court squarely holding that the existence of an agency relationship is a question of fact properly to be submitted to the jury.

In the case at bar the issue depended in part upon the credibility of witnesses (Goldblatt, Meehan and Gettings, at least) and in part upon the weight or effect to be given to their testimony.[3] Thus, under the rule of the *Gunning* case, the Court below erred in giving the peremptory instruction herein assailed.

Appellee's references to *ILWU v. Juneau Spruce Corp.,* 189 F. 2d 177 (1951), and *United Electrical etc. v. Oliver Corp.,* 205 F. 2d 376 (1953) (Br. pp. 24-26), are not in point.

In the *Juneau Spruce* case the only specification of error directed to the instruction quoted on page 24 of appellee's brief and relating to Vern Albright, "raised the issue of whether the trial Court [the District Court for the Territory of Alaska] was a

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[3]In Appendix I are collected a few examples of the testimony which if believed (credibility) or if given the weight or effect urged by appellants (also a jury function) would indicate the absence of an agency relationship or demonstrate that the only relationship was with the Local and not with the International.

district court of the United States" and whether therefore the rules of agency described in Section 301 of the Taft-Hartley Law or the common law rules of agency governed (*ILWU v. Juneau Spruce* [9 Cir., No. 12527], AOB p. 18). There was no specification of error there which, as here, directly charged that an instruction specifying named individuals as agents of the union deprived it of the right to have "contested issues of fact" submitted to the jury. The *Juneau Spruce* case therefore is no authority for the point involved here.

In the *Oliver Corporation* case the question of the existence of Hobbie's agency as distinguished from the question of its course and scope was apparently undisputed. For there the evidence showed that the very contract, the alleged breach of which was the basis for the suit, was signed by the International "by Charles W. Hobbie" (205 F. 2d 376, at 381). And the Court referred to Hobbie as the person "who had signed the contract as representative of the International union" (*id.,* 386). Obviously no question of fact respecting the existence of Hobbie's agency (as distinguished from its course and scope) could exist upon such a record, and appellants there took no exception to the Court's charge that Hobbie was in fact an agent of the International union.[4] Thus, the *Oliver* case raised no issue comparable to the one here presented and can be no authority for any proposition involved in this case.

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[4]Appellants' brief therein (*United Electrical, etc. v. Oliver Corp.* [8 Cir., No. 14661]), which we have examined, reveals this to be the fact.

The question of agency was a contested issue and there was some evidence from which the jury could have found that at least one or more of the persons whom they were peremptorily instructed were agents were in fact not agents. The peremptory instruction therefore deprived appellants of the jury trial to which they were entitled and the judgment must be reversed with directions to grant a new trial.

II.

THE INCONSISTENCY OF THE VERDICT REQUIRES A REVERSAL OF THE JUDGMENT.

Appellants' contention is that the verdict (TR 136) and the judgment entered on it (TR 137-139) in favor of the 110 individual defendants requires a reversal of the judgment entered against appellants. (TR 140-141.) For it is claimed that these individuals acted on behalf of appellants and if the individuals committed no actionable conduct against appellee, then, as a matter of law, neither could appellants (the unions) have done so.

To say that "logical consistency in verdicts is not required" (Br. p. 26) is to beg the issue. The question is whether these judgments can stand together, not because in some formal sense they are illogical (as they are), but because the finding of nonliability as to the individual defendants necessitates as a matter of law the reversal of a contrary finding as to the unions.

Here the case was tried upon the theory expressed in open Court by counsel for appellee "that the Pineapple Company's damages * * * occurred within twenty minutes of one day", and that the facts respecting the injury to the Pineapple Company "are absolutely identical" with the facts respecting the claimed injury to the two employees of the Pineapple Company. (TR 228.)[5] That being so, the exoneration of the persons involved in that episode requires the exoneration of their alleged principals.[6]

The cases cited by appellee (Br. pp. 26-28) do not require a contrary conclusion. They involve either no conflict in the verdicts (as in *Jayne v. Mason-Dixon Line,* 124 F. 2d 317 [1941] wherein it was held that a wife riding with her husband driver could recover damages against a third party despite a verdict against the husband, because under the local law the contributory negligence which precluded his recovery was not imputed to her); or legally unrelated and separate issues (as in *Dunn v. United States,* 284 U.S. 390 [1932], wherein a criminal indictment contained several counts and the Court adverted to the long established rule that each count stood on its own feet, so to speak, and pointed out that separate indictments could in fact have been returned); or the absence of a square finding in favor of the servant (as in *Southeast Greyhound Lines v. McCafferty,* 169 F.

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[5]See AOB pp. 3, 4, n. 2. The injury to these two employees obviously occurred during the twenty minute eruption of violence on September 28, 1949.

[6]In addition to the authorities already cited (AOB pp. 29-30), see *Weekley v. Pennsylvania R. Co.,* 104 F.Supp. 899 (1952).

2d 1 [1948], wherein a *mistrial* as to the servant was held not to be a *finding* as to his non-liability).

Here there were no such situations: the verdict and judgment in favor of the individual defendants was unequivocal; the causes of action set up against all defendants (both individual and union) were identical and the union's liability was, as it obviously had to be, predicated upon the doctrine of *respondeat superior;* and there was no special defense open to the individuals not open to the unions which would justify the results reached.

On the last point the argument is made that the liability of the unions and the individuals rested "upon different findings of fact". (Br. p. 29.) But the record on this point underlines our view that on the facts here the judgments cannot stand together. For the only distinction made in the instructions was that as to the individuals there must also be a "conspiracy" finding before a verdict could be returned against them. (TR 1436-1437.) Thus in exonerating the individuals the jury must have found that the individuals did not conspire as charged. But if the individuals did not conspire neither did the unions, for the unions could only conspire through and by means of the individuals as indeed was charged by the Court below. (TR 1434.) Since the jury exonerated every alleged individual conspirator, there is no basis upon which it can now be urged that the associations "conspired" *in vacuo,* so to speak, to commit the tort.

The suggestion that liability can be imposed upon the unions because of the alleged conduct of nondefendant individuals is of no help to appellee. The "100 other longshoremen" (Br. p. 27) referred to as participating in the picketing and rioting were nowhere identified in the record and liability can hardly be imposed upon these appellants for what unknown and unidentified persons may have done. Nor is there a showing that the Hawaiian picket was an agent or employee of either of these two appellants, and the suggestion that liability may have been predicated upon his conduct is not consistent with the instruction given on the subject. (TR 1431.) If, in fact, liability was predicated upon the Hawaiian picket's activities, the verdict and judgment against the unions has to be reversed and set aside as being unsupported by substantial evidence.[7]

Nor for the reasons heretofore stated[8] can liability be imposed on these appellants for the alleged conduct of the nondefendants Gettings, Schmidt, Bodine and Goldblatt. Certainly a verdict and judgment predicated, for example, on the alleged activities of Goldblatt or Bodine, has to be reversed because of lack of substantial supporting evidence.

In sum, appellee engages in a series of ingenious arguments to obscure (1) the fact that there was

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[7]Incidentally, our Specification of Error No. 5 (AOB p. 17) is broad enough to embrace this and other points we make despite appellee's apparent misconception that those points are not properly before this Court (Br. p. 66).

[8]Supra, pages 3-5.

submitted to the jury the issue of whether named individual defendants had committed the tort against appellee and if so, whether appellant unions were responsible under the doctrine of *respondeat superior,* and (2) the fact that the finding exonerating the individual defendants requires as a matter of law the reversal of the judgment against these appellants.

III.

THE ERRONEOUS INSTRUCTIONS ON THE TAFT-HARTLEY LAW VIOLATION REQUIRE A REVERSAL OF THE JUDGMENT.

There seems to be no quarrel with appellants' assertion (AOB pp. 36-39) that in order for there to be a cause of action under Section 303(a) of the statute, there must be present at least a primary employer, a trade union, and a secondary employer. It is the economic relationship between these three and the application of economic pressures at specific points in that relationship that determine whether or not the statute has been violated. Only if, in a dispute with Employer I, the union puts pressure on Employer II for the prohibited objective does the statute come into play. Thus the rationale of the statute is to prevent direct economic injury to an employer totally disinterested in the conflict.

As appellants have heretofore pointed out (AOB pp. 37-38), even admittedly simple, direct, primary activity has secondary effects and if the statute is read literally it outlaws even primary, peaceful pick-

eting. In order to avoid this result, which is at variance with both the legislative intent (AOB p. 39) and the Constitution (cf. *Thornhill v. Alabama,* 310 U.S. 88 [1940], and *Carlson v. California,* 310 U.S. 106 [1940]), the Courts have required clear proof of secondary activity and have refused to find violations of the statute where there was only primary activity (cf. *NLRB v. International Rice Milling Co.,* 341 U.S. 665; *Douds v. Sheet Metal Workers Union,* 101 F. Supp. 273), or where the two employers were so closely connected economically as to render inapplicable the rationale of the statute (*Douds v. Metropolitan Federation etc.,* 75 F. Supp. 672).

Here appellants established that there was primary, not secondary, activity at The Dalles and that such activity was legitimately directed at the employers of longshore labor there (either the Port of The Dalles or appellee). (AOB pp. 43-45.)[9]

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[9]Appellee's suggestion (Br. p. 34) that appellants have made a novel assertion without record citations to support this claim can only mean that appellee has overlooked the transcript references cited at AOB p. 45. The record referred to reads:

"Q. All right. Now, what did you ask the Port of The Dalles to do? Did you ask them to hire Portland longshoremen up there, 92 miles away from there, or did you say that you wanted to represent their employes? Which was it?

A. We wanted to work according to the longshore agreement. Now, if they had recognized and agreed to work according to the longshore agreement, then we could have sat down and worked out these other matters, Mr. Krause, such as how we was going to hire people, and so forth. But the people absolutely refused to have anything to do with us in the way of reaching an agreement of any kind.

Q. You wanted to have a contract with the Port of The Dalles between the Port of The Dalles and Local 8; is that right?

A. *And the Pineapple people who were doing the work.*

Q. Do you have contracts with the people that do long-

Here, also, appellants sought to establish, but were prevented by rulings below from establishing, that the economic relationship between appellee and the Hawaiian stevedoring companies was so close as to render the statute inapplicable to the case at bar. (AOB pp. 50-54.)[10] The failure to submit appellants' theory of the case on these points to the jury is such error as to warrant a new trial.

The instructions submitted on the applicable law were also erroneous. If the primary employers were the Hawaiian stevedoring companies and appellee was the secondary employer, then there was no occasion for instructions respecting the activities of appellants vis-a-vis the crane company, the trucking companies, etc. Clearly such instructions could have given the jury no conception as to which if any of the multitude of employers here involved were pri-

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shore work, or do you have contracts with the people that run the ships?

A. *We have both,* I would say.

Q. Well, you have contracts with the people that run the ships when they also have their own stevedores. Otherwise your contract runs to the stevedores, doesn't it?

A. Well, in some instances on that one, Mr. Krause, *there are some steamship lines who in some ports on the Pacific Coast do their own stevedore work.* In other ports it is sublet to contractors. And the master agreements—*the people that own the ships are parties to the agreement* as well as the people who do the work, the contracting stevedores. *They are both parties to the agreement.* * * *'' (TR 1285-1286.)

[10] ''Through a complex system of interlocking directorates the Big Five is able to exert sufficient influence to control most of the Territory's economy. Their *sphere of domination* extends not only to the two basic island industries, sugar and *pineapple,* but encompasses such diverse fields as shipping, banks, and trust companies, wholesale and retail food and mercantile stores, press and radio, lumber and building materials, public utilities and tourist trade, among others.'' Comment: *Alaska and Hawaii: From Territoriality to Statehood,* 38 Calif. L.R. 273, 274, n. 2 (1950).

mary and which secondary; and the jury could not have had a conception from the instructions given of the standards required to justify imposition of liability on appellants.

Furthermore, the key instructions (TR 1424-1426) gave the jury two utterly inconsistent approaches to the problem. On the one hand, the jury was charged in effect that the crane company, the trucking companies, and others, were primary employers, and appellee secondary; and a moment later it was charged in effect that appellee was the primary employer and the other named employers were the secondary ones. Such an equivocal direction to the jury on a basic issue requires a reversal of the judgment. (*Bollenbach v. United States,* 326 U.S. 607 [1946].)

Appellee's suggestion that the contentions pressed by appellants (AOB pp. 54-61) were not presented below (Br. p. 54) ignores the record. Specific objections were made to the trial Court so that it had ample opportunity to correct its error.[11]

Certainly the instruction that the Union Pacific Railroad Company was a person within the meaning of Section 303(a) was clear error. The National Labor Relations Board has just recently refused to follow the Seventh Circuit's decision in *International Rice Milling Co. v. NLRB,* 183 F. 2d 21 (1950), reversed 341 U.S. 665 [1951] (Br. pp. 57-58, n. 23), and has reaffirmed its earlier conclusions (*International Brotherhood of Teamsters,* 84 NLRB 360; *In-*

[11]Quoted in Appendix II are excerpts from the transcript wherein the points mentioned were specifically raised.

ternational Brotherhood of Electrical Workers, 87 NLRB 99, and *International Brotherhood of Electrical Workers,* 89 NLRB 221) that the statute is not applicable to either governmental agencies or railroad corporations (*International Brotherhood of Electrical Workers,* 104 NLRB No. 147, CCH Labor Law Repts., §12501, May 27, 1953). The Board's reasoning (*International Brotherhood of Electrical Workers,* 89 NLRB 221, 222-225) is obviously sound (cf. *United States v. United Mine Workers of America,* 330 U.S. 258) and should not be departed from here.

In any event, as appellants have already pointed out (AOB pp. 56-57, 60-61), business between appellee and the various employers named was not interfered with by reason of any activity of appellants, but because those employers for business reasons of their own did not desire either to commence or to continue such relationships.[12]

The suggestion that a violation of the Act may be found because of appellee's inability to deliver to its California customers (Br. p. 60) is not only novel in the sense that it was not urged below but is startling in its implication. Any union activity (simple, direct, peaceful picketing) may well result in inabil-

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[12]The railroad and trucking companies had insufficient equipment and did not wish to engage in a one-way haul (Union Pacific [TR 1034-1035]; Consolidated Freightways [TR 1007, 1034-1035, 1163]; Nevada Fast Freight Trucking Co. [TR 1034-1035, 1163]; Portland Pendleton Fast Freight [TR 586-587]). With respect to the crane company, the evidence shows that there could have been no cessation of business since none could have taken place after September 27, 1949, the day before the riot, by virtue of the purchase of the crane by appellee on that day. Furthermore, the crane company's employee refused to cross the picket line at The Dalles because of a rule of *his* union. (TR 882.)

ity on the part of an employer to make deliveries. To our knowledge it has never before been suggested that that fact alone will transform such protected activity into a secondary boycott violative of the statute. The fact that appellee makes such a suggestion demonstrates the validity of the carefully documented argument we made (AOB pp. 36-43) in support of the contention that it is very important in a case like this to determine who was the primary employer and who was the secondary employer and to instruct the jury correctly on these issues. The failure of the Court below to make explicit the appropriate distinctions in the instructions given to the jury was erroneous and requires a reversal of the judgment.

IV.

THE FAILURE TO MINIMIZE DAMAGES REQUIRES A REVERSAL OF THE JUDGMENT.

Appellee's view that our only objection on this score is to the inadequacy of the Court's instruction (Br. pp. 62-63) is not well taken. Although we are of the view that the instruction was inadequate (TR 1457; AOB pp. 13-14), we have also urged that the verdict is contrary to the law and the clear weight of the evidence and that it is excessive (Specifications of Error Nos. 5 and 6, AOB p. 17).

Apparently appellee does not quarrel with the cases we have cited (AOB p. 63) which demonstrate that appellee had the duty to take steps to minimize its damages. Nor apparently does it quarrel with our

argument that it obviously did *nothing*—not one thing—to achieve that result. Instead it suggests (Br. pp. 65-66) that its failure even to try to hold down its damages was not unreasonable. But the record will not bear this out.

We have already quoted (AOB p. 64) the unqualified admission of one of appellee's own officers that appellee could have cancelled contracts representing $142,000[13] worth of fruit in ample time but it simply "didn't choose to do it." (TR 968.) For a business man to gamble $142,000 on the outcome of a lawsuit is, we submit, neither reasonable nor prudent.

Secondly, the record shows that non-Hawaiian pineapple was available and not used. The argument that such fruit is so inferior that appellee "could not be expected to sacrifice the good will of its customers throughout the nation" (Br. p. 66) by using it, is hardly consistent with the testimony of its own "factory manager in charge of production" (TR 1288) that other nationally known concerns have and use non-Hawaiian pineapple.[14]

Thirdly, alternative and less wasteful uses for the fruit on hand were available but ignored. The suggestions that the San Jose plant had neither the techniques nor the facilities for canning fruits separately or as fruit mix or that such items were not saleable (Br. p. 66) are directly contrary to the testimony of responsible officials of appellee.

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[13]It will be remembered that the total verdict was for slightly over $200,000.

[14]"Calpak has the Philippine source; Libby McNeil has a Mexican source." (TR 1290.)

"Q. Mr. Woodworth, you are Vice-President in charge of marketing and sales of the Hawaiian Pineapple Company?

A. That is correct.

* * *

Q. Now, Barron-Gray, as you have indicated, they just process pineapple or fruit?

A. *Fruits.*

* * * * * * *

Q. Then if you process, in the years that you have processed pears, you have canned them and sold them; is that right?

A. Yes.

Q. And in the years that you have processed apricots you have canned them and sold them?

A. Yes. We tried hard to sell them.

Q. In the years you have canned peaches you have sold them, and in the years you have canned apricots you have sold them, or pears, or maybe cherries, or whatever it is they put up in cans, you always sell them; isn't that correct?

A. It is the responsibility of our division to sell them.

Q. And you do sell them, don't you?

A. *We sell them; that is right. If we don't sell them that year, we will the next.*

Q. In other words, *what you process down there you sell;* that is true, isn't it?

A. *Surely."* (TR 1154-1155.)

"Q. Now, would I be correct in stating that the John Smith Company, which deals in fresh fruits, and wants a thousand cases of peaches or pears, or anything that you pack, they go to you and they say, 'I want to buy a thousand cases of

peaches and I want you to put my label on them,' then you pack them and you put them in cartons with his name on them and you ship them to him; is that right?[15]

A. That is right.

Q. Does it apply to Fruit Cocktail?

A. To some extent.

Q. To a minor extent; is that right?

A. No, *I wouldn't say minor.*

Q. Oh. Well then, whether it is minor or major, does it apply to Fruit Salad, also?

A. I believe it does.

Q. Peaches?

A. I believe it does.

Q. Pears?

A. Yes.

Q. Prunes?

A. Yes.

* * * * * * *

Q. So you pack apricots, too?

A. We do.

Q. Now, in what sized cans are peaches, pears and apricots usually packed?

A. All the different sizes of cans.

* * * * * * *

Q. Then, as I understand it, when I go into a grocery store to buy some peaches, pears, or all of this stuff, it might be under the name of S & W or it might be under the name of Del Monte, or it might be under a hundred different names, but it could have come out of your plant; is that right?

A. That is right.'' (TR 970-971.)

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[15]The witness was the assistant treasurer of appellee. (TR 934.)

Clearly this evidence, coming as it does from appellee's own responsible officers, demonstrates that the damages not only could have been mitigated but that it was utterly unreasonable for appellee to choose not to do so but blithely to go ahead and let them mount up.

> "[Appellee's] conduct in dealing with these shipments and making claims for loss * * * was obviously strategic, and stemmed from the defendant's refusal to accede to [its] demand that [the pineapple be unloaded under non-union conditions at The Dalles] as well as from [its] interest in enhancing [its] alleged damages for the purposes of this law suit." (*American Can Co. v. Russellville Canning Co.,* 191 Fed. 2d 38, 55 [1951].)

While we were in error in stating that the barge arrived at The Dalles on September 26 (AOB, p. 66), the error is of no consequence to the point made. The barge having arrived at The Dalles "on the evening of September 24, *Saturday,* at about 8:30 or 9 o'clock" (TR 1025), it could not reasonably be expected that unloading operations would commence that moment. Actually, no unloading operations were set up for Saturday or Sunday and no unloading operations were possible for the next several days, not because of any activity of appellants but because of the impossibility of appellee's obtaining transportation for reasons quite unconnected with those here involved.

> "Mr. Krause. Q. What did you do regarding obtaining someone to transport the cargo; that is, before the barge arrived at The Dalles?

A. We contacted the large trucking companies and the railroads.

* * * * * * *

Mr. Krause. Q. After the barge arrived at The Dalles, what was their attitude toward handling the cargo?

* * * * * * *

The Witness. They stated that they had insufficient equipment available, and they objected on the ground that it was a one-way haul, among other reasons." (TR 1034.)

Appellee's own trucks did not arrive in California until midday on the 28th (TR 1038). Thus even without any interference by appellants, the cargo could not have arrived at the San Jose plant much before the first of October.

And yet, as we have pointed out, of the approximately 138,000 cases of fruit mix packed and processed (and it is this item which makes up the overwhelming bulk of appellee's claimed damages), over half of them were packed before October 1st.[16]

Clearly, therefore, the award of the maximum damages prayed for, representing as it does a failure to take into consideration the duty of appellee to minimize damages, and a further failure to eliminate from the computation that portion of the loss which was not and could not have been the proximate result

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[16]On September 27, 14,064 cases were packed (TR 996); on the 28th, 16,511; on the 29th, 17,460½; on the 30th, 16,718; and on the first of October, 17,000. (TR 957.) This makes a grand total of over 80,000 cases on these four or five days when in all likelihood there would have been no pineapple at the plant irrespective of any conduct on the part of appellants.

of appellants' conduct, cannot stand and the judgment must either be reversed or this Court must by its remittitur reduce the amount of damages.

The trial Court's observation that "the jury unquestionably felt that Pineapple was not required to accept damages scaled down for the benefit of the unions, the aggressors" (TR 167), implicitly recognizes that the jury's assessment of damages was based not upon the evidence and the instructions, but upon bias and prejudice. For whether the jury (or the Court below) regarded the unions as "aggressors" is irrelevant to the issue and does not change the applicable rules of law. Every tort-feasor or contract breacher is an "aggressor" in the legal sense. Yet this does not deprive a litigant of the protection of rules of law which require that an injured party take reasonable steps to minimize its damages and which further provide that the only damages recoverable are those *directly* resulting from the unlawful conduct. To brand appellants as "aggressors" is no answer to the legal questions posed by the record here.

CONCLUSION.

For the foregoing reasons, and each one of them, the judgment below against these appellants must be reversed.

Dated, San Francisco, California,
November 25, 1953.

Respectfully submitted,
GLADSTEIN, ANDERSEN & LEONARD,
By NORMAN LEONARD,
Attorneys for Appellants, International Longshoremen's & Warehousemen's Union (CIO), and International Longshoremen's & Warehousemen's Union, Local 8.

(Appendices I and II Follow.)

Appendices.

Appendix I

Re MEEHAN:

"It should be clear, however, in order to avoid any confusion in your area, that you are not empowered to direct or apply a policy on your own, but can do so only when specifically instructed by the International officers, and only at such times are you empowered to act in behalf of the International union." (TR 1217.)

"A. * * * But I wasn't an officer. Only elected officials are officers in our union. I couldn't commit the International to anything.

Q. You what?

A. I couldn't commit the International to anything.

Q. To anything?

A. That is right. I was restricted to whatever was required by the locals concerned.

Q. Then when you go into a local situation, and when you are so representing them, do you represent the local, or do you represent the International?

A. I represent the local.

Q. You say you are without authority to commit the International to anything?

A. I have no authority to commit the International, no." (TR 1337.)

"Q. All right. By the way, Mr. Meehan, who had instructed you to contact these other union officials?

* * * * * * *

Q. I said union officials, you understood; not Port officials.

A. Oh, Bob Baker [President of Local 8] asked me to——

Q. Oh, Bob Baker told you to contact the union officials?

A. Any unions that I could contact." (TR 1371-1372.)

Re SCHMIDT:

"Q. Isn't that the Mr. Schmidt who is also one of the officers of the ILWU?

A. No. He is no officer of the ILWU.

* * * * * * *

Q. You say that he is not an officer of the International?

A. He was never an officer of the International Union. He was president of Local 10.

Q. He was president of Local 10?

A. Yes, sir." (TR 704.)

Re BODINE:

"Q. To San Francisco, to Mr. Bodine or to Mr. Thomas?

A. Yes.

Q. Those are both officials of the ILWU, are they not?

A. No. They are what are known as coast committeemen. They are officials of the Longshoremen Di-

vision. They are not officials of the International. They are elected by the longshoremen to represent them in negotiations and in the implementation of the longshore contract." (TR 717.)

With respect to Bodine, this is the only evidence in the record and therefore any finding that Bodine was engaged in the course and scope of his "agency" was clearly contrary to the weight of the evidence. Specification of Error No. 5 (AOB p. 19) is sufficiently broad to cover this point.

Appendix II

"With respect to our Proposed Instructions Nos. 40 and 41—and this also goes to certain instructions that your Honor gave—your Honor failed to give 40 and 41 and gave some others which were contrary, and we take exception to the failure to give 40 and 41 and to the ones that your Honor gave to the contrary on the ground that the instructions we proposed correctly state the elements of an offense of violation of Section 303 of the Taft-Hartley Act, and that section requires the inducing of employes of other employers, and the jury should have been so instructed; and that the Hawaiian Pineapple Company should not have been included in the instruction as an employer; that the thrust of the act was to meet inducing employes of other employers to cease doing business with the primary employer, and it did not go to inducing employes of the primary employer, in this case the Hawaiian Pineapple Company." (TR 1454-1455.)

"We take exception to your Honor's instruction that the defendant unions could be liable for inducing or encouraging, within the meaning of the statute, even though there was no concerted quitting.

The Court. No what?

Mr. Leonard. Even though there was no concerted quitting of employment by the employes themselves. Your Honor will recall that you so instructed. We

think the real thrust of the statute was to prevent the interruption of interstate commerce, and Congress did not intend to penalize unions that engaged in futile acts; that if the encouragement or inducement resulted in nothing there was no violation of the statute.

Similarly, your Honor instructed the jury that it was immaterial whether or not a person actually ceased doing business. That is on the second phase of the statute. Now, we think that what Congress was aiming at was an interruption of commerce, and if the activities complained of did not result in an interruption of commerce there is no violation of the statute.

The Court. You are not intimating that this did not result in an interruption?

Mr. Leonard. I appreciate that, if your Honor please, but the fact is you did instruct the jury—I think I have correctly summarized your Honor's instruction, and we respectfully think that it does not correctly state the provision of the statute, so we do take an exception.

I believe your Honor instructed the jury, as I took notes during the course of your Honor's instructions, that it would be a violation of the statute if any of the defendants told the truck drivers of Hawaiian Pineapple Company that the Port of The Dalles was threatening local working conditions. We take exception to that instruction on the ground that it does not properly state the law as provided for in the Taft-Hartley Act.

The Court. I didn't quite understand that, Mr. Leonard.

Mr. Leonard. That was an instruction that your Honor gave from the bench. It is a little difficult to follow them, but, as I understood the instructions, when your Honor was discussing the elements of the Taft-Hartley Act, your Honor stated—I may be in error, but this is the way I took it down as your Honor went along—that it would constitute a violation of the statute if any of the defendants—and I suppose this had particular reference to the three men who went out to the city limits and talked to the truck drivers—sought to induce them not to come down to the Port of The Dalles, and told the truck drivers of the Hawaiian Pineapple Company that the Port of The Dalles was threatening the working conditions of the local people and therefore sought to induce them not to go in. I believe your Honor so instructed the jury, and if I am correct in that I think that was an incorrect statement of the law, because I think they had a right under Section 8(c), and generally, to go out and tell those truck drivers that in their opinion the Port of The Dalles was threatening their working conditions and to ask them, therefore, not to go into the Port of The Dalles but to support them in their efforts to maintain working conditions. Now I may be in error. Perhaps your Honor did not give that.

The Court. That is not quite what I said. I said that if it was an encouragement and inducement to take concerted action in the course of their employment and one of the objects was to force one person

to cease dealing with another person, that then this was an encouragement, and it didn't make any difference what they told them.

Mr. Leonard. As I said, your Honor, I might be in error because of the circumstances under which it is necessary to jot these notes down, but I take these exceptions under the rules——

The Court. I understand, Mr. Leonard.

Mr. Leonard. If I am in error, I am in error, but if I am not I have got my exception on the record.

The Court. You have your exception." (TR 1457-1460.)

"Mr. Leonard. Very well. Then, if your Honor please, we take exception to that instruction in which you told the jury that there could be inducement or encouragement by talking to representatives of other unions or by talking to other employers, or by bringing pressure upon employes of other employers. I think here we simply disagree—and I say it respectfully, your Honor,—as to what constitutes a cause of action under the statute. When Congress spoke of persuading employes of other employers it is our view that they were talking about persuasion directed to employes whom the union was seeking to cause to quit work, and not by a wholly indirect course of conduct, so we think that there must be direct persuasion rather than indirect persuasion, and we take exception to your Honor's instructions on that ground.

Now, we also take exception to the instruction which your Honor gave to the jury that the mere presence

of the Hawaiian picket in The Dalles did not justify the conduct of either the International or Local 8 and it might be considered in determining the object of the conduct of the International and Local 8.

The Court. I said if they had any connection.

Mr. Leonard. Yes, considered in connection with it. We think——

The Court. I said if they had any connection with his presence that then they might consider that.

Mr. Leonard. I am not sure that your Honor made that statement. If your Honor did so state, I didn't catch it as I was taking my notes.

We have already covered this in our exceptions to your Honor's failure to give our instructions, but your Honor did specifically say to the jury that there was no evidence here that there was a primary strike. We think there is some evidence from which the jury could reasonably make such an inference, so we take exception to that instruction." (TR 1461-1462.)